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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 735

JANE FROMAN,

Petitioner,

—against—

PAN AMERICAN AIRWAYS, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement

Petitioner, plaintiff below, seeks a writ of certiorari to review an order of the Court of Appeals of the State of New York, decided April 14, 1949, 299 N. Y. 88, which affirmed an order of the Appellate Division of the Supreme Court, entered June 17, 1948, 274 App. Div. 767, which in turn affirmed an order of the Supreme Court at Special Term, entered in N. Y. County on February 20, 1948, 190 Misc. 974, granting a motion by respondent for summary judgment under Rule 113 of the Rules of Civil Practice, dismissing the first cause of action set forth in the complaint, with leave to amend the same by reducing the amount

of the damages demanded therein to the sum of $8,291.87.

The original complaint, served on September 15, 1944, alleged four causes of action. At that time and until amended on March 2, 1953, the action was entitled *"Ellen Jane Ross, known professionally as Jane Froman, and Donald Ross* v. *Pan American Airways, Inc."* In substance, the first cause of action alleged that petitioner, while riding as a passenger in one of respondent's seaplanes known as the "Yankee Clipper", suffered bodily injuries when the plane crashed near Lisbon, Portugal, on February 22, 1943, and that the accident was caused by the negligence of defendant.

The third cause of action alleged that the accident was due to the "wilful misconduct" of respondent. The second and fourth causes of action sought recovery for loss of baggage in the sum of $10,000 and for medical expenses and for loss of society to the extent of $100,000.

In its answer, respondent pleaded Article 22 of the Warsaw Convention, which limits recovery to $8,291.87 for bodily injuries suffered by a passenger, in the absence of wilful misconduct, and also limits the amount of recovery for lost checked baggage and hand baggage.

Respondent's motion for summary judgment dismissing the first cause of action was made upon the ground that under the provisions of Article 22 petitioner had no cause of action for damages in excess of $8,291.87 in the absence of a plea of wilful misconduct.

Petitioner's principal argument in opposition to the motion was that no ticket had been delivered to her; that under the provisions of Article 3 of the Warsaw Convention, the carrier was therefore not entitled to avail itself of the provisions limiting its liability; and that, therefore, her first cause of action for damages in excess of the limited amount was good despite the lack of a plea of wilful misconduct.

Respondent's affidavits in support of the motion for summary judgment set out copies of the tickets issued in the name of petitioner which called for transportation which was "international" within the meaning of the Convention and which conformed to the requirements of Article 3. The tickets were delivered to a Mr. Saul Abraham of the U. S. O. Camp Shows, Inc. Petitioner submitted her own affidavit in opposition to the motion, stating that it was her understanding that U. S. O. Camp Shows, Inc. had arrangements with the United States Government to supply entertainment for the Armed Forces, that "Mr. Abraham was in charge of all arrangements up to the point of embarkation," and that she had no knowledge of her destination until after boarding the airplane.* She also submitted an affidavit by Abraham,

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* In her affidavit in opposition to the motion for summary judgment, petitioner stated (Papers on Appeal, p. 39):

> "I received no advance information from either the Government or USO Camp Shows Inc. as to when and where I was to go and by what mode of transportation."

However, during the subsequent trial before Mr. Justice Steuer, she testified as follows (Case on Appeal, p. 196a):

> "Q. As a matter of fact, when was it that you made your arrangement with USO as a result of which you were on this Clipper ship when this accident happened? A. I was playing in a show with Ed Wynn called 'Laugh, Clown, Laugh' when I got a wire asking me to volunteer to go overseas.

which stated that he was in charge of arranging the transportation and that he picked up the tickets. He said that until the day of departure he retained possession of the tickets. On that day, he took all of the performers to the airport, lined them up before desks attended by the respondent's clerks. and placed in front of each one, including the petitioner, his or her ticket and passport. The clerks then tore off the New York-Lisbon stubs and passed the tickets and passports along to desks of customs inspectors, as the performers moved to the same desks. After checking the tickets and passports, the inspectors handed them back to Abraham, who in turn handed all the tickets to the manager of the company as the latter boarded the plane.

After an initial denial of the motion on procedural grounds, Special Term granted the motion on February 28, 1948, dismissing the first cause of action with leave to petitioner to amend by reducing the prayer for damages to $8,291.87. The grounds for the decision were stated to be that Abraham had implied authority to receive the petitioner's ticket, which concededly fulfilled the requirements of Article 3 of the Convention.

Petitioner did not avail herself of the leave to amend the first cause of action. Instead she appealed the decision to the Appellate Division which affirmed without opinion. Petitioner then appealed to the

---

I sent my answer back in about an hour and a half and from that time on I was on call.

* * *

Q. How much of your time in 1943 had you agreed to give on that basis? A. Our tour was to last three months. We were to work in England, all for camps over there, and to get down to North Africa, I believe."

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Court of Appeals which also affirmed in the opinion reported in 299 N. Y. 88 and printed in the Appendix to the petition. The grounds for the affirmance were stated to be that, by boarding the airplane as a traveler on the ticket, petitioner had ratified and adopted what had been done by the Army and later by Abraham, in taking out the ticket in her name. This was so, whether or not Abraham had actual or implied authority to accept delivery of the ticket.

After the passage of several years, the case involving the second, third and fourth causes of action, was tried before Mr. Justice Aron Steuer and a jury in the Supreme Court, New York County (from March 9 to 18, 1953), and, at the conclusion thereof, the jury brought in a verdict for respondent on the issue of wilful misconduct. The court then directed a verdict in favor of petitioner for the limited amounts conceded to be due to her. The judgment entered thereon was unanimously affirmed by the Appellate Division, 284 App. Div. 935. Thereafter, petitioner's motion for leave to appeal to the Court of Appeals was denied by the Appellate Division on January 18, 1955, 285 App. Div. 806, and by the Court of Appeals on February 28, 1955, 308 N. Y. — (not yet reported).

The present petition is restricted specifically to the order of the Court of Appeals dated April 14, 1949, which affirmed the Appellate Division's affirmance of the order of Special Term granting respondent's motion to dismiss the first cause of action.

Petitioner does not attack the validity of the Warsaw Convention, nor does she deny that the transportation involved was "international transportation by air" as defined in the Convention. Her only con-

tentions are (1) that a ticket was not delivered to her as required by Article 3 of the Convention (or that there was at least an issue of fact in this regard), and (2) that the transportation was "performed directly by the state," so that the Convention did not apply.

Warsaw Convention

The pertinent provisions of the Warsaw Convention (49 Stat. 3000 ff.) necessary for consideration of petitioner's application for a writ herein, are contained in Articles 1, 2 and 3, as follows:

"CHAPTER I. SCOPE—DEFINITIONS

Article 1

(1) This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise.

(2) For the purposes of this convention the expression 'international transportation' shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this conven-

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tion. Transportation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party shall not be deemed to be international for the purposes of this convention.

(3) * * *.

Article 2

(1) This convention shall apply to transportation performed by the state or by legal entities constituted under public law provided it falls within the conditions laid down in article 1.

(2) * * *.

CHAPTER II. TRANSPORTATION DOCUMENTS

Section I—Passenger Ticket

Article 3

(1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:

(a) The place and date of issue;

(b) The place of departure and of destination;

(c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;

(d) The name and address of the carrier or carriers;

(e) A statement that the transportation is subject to the rules relating to liability established by this convention.

(2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability."

When the Convention was concluded in 1929, it contained an "Additional Protocol" signed by the original High Contracting Parties (which did not then include the United States) reading as follows:

"ADDITIONAL PROTOCOL

With Reference to Article 2

The High Contracting Parties reserve to themselves the right to declare at the time of ratification or of adherence that the first paragraph of article 2 of this convention shall not apply to international transportation by air performed directly by the state, its colonies, protectorates, or mandated territories, or by any other territory under its sovereignty, suzerainty, or authority."

President Roosevelt's proclamation of the adherence of the United States to the Convention in 1934 contains the following language (49 Stat., pt. 2, at page 3013):

"AND WHEREAS the said convention and the said additional protocol have been definitively

adhered to by the United States of America, subject to the reservation, as is provided for in the additional protocol, that the first paragraph of Article 2 of the convention shall not apply to international transportation that may be performed by the United States of America * * *.

* * *

NOW, THEREFORE, be it known that I, Franklin D. Roosevelt, President of the United States of America, have caused the said convention and additional protocol to be made public to the end that the same and every article and clause thereof may be observed and fulfilled with good faith by the United States of America and the citizens thereof, subject to the reservation aforesaid."

The Additional Protocol, to which the United States adhered and under the terms of which it declared that the Convention should not apply to transportation "performed directly by the state," is not printed by petitioner. Her first paragraph, on page 4 of the petition under the caption "United States Reservation to Article 2(1)", is an inaccurate quotation from the recitals of the proclamation and the remaining paragraphs on pages 4 and 5 of the petition under that caption are extracts from the Convention itself and have nothing whatsoever to do with the United States Reservation to Article 2(1).

ARGUMENT

No federal question of substance is presented by the holdings of the New York Court of Appeals that the transportation was not performed by the United States and that petitioner had ratified the act of her agent in taking delivery of the ticket issued in her name.

There is nothing in the decision of the New York Court of Appeals sought to be reviewed which should impel this Court to grant certiorari. The decision is not in conflict with any decision of this or any other court. The particular circumstances under which the ticket was delivered and the transportation performed were, as the affidavits on the motion show, peculiar to wartime transportation of whole groups and are emphatically not likely to arise in the ordinary course of international air transportation, so that the questions are not of wide public importance. Moreover, there is no substantial federal question presented by the decision, and it is clearly correct.

In the case of *Evelyn Rice* v. *Sioux City Memorial Park Cemetery, Inc., et al.,* No. 28—October Term, 1954, 23 LW 4195, decided May 9, 1955, this Court vacated and dismissed a writ of certiorari as improvidently granted in an opinion delivered by Mr. Justice Frankfurter wherein he said (4196):

> "This Rule, [Supreme Court Rule 19] formulated 30 years ago, embodies the criteria, developed ever since the Evarts Act of 1891, by which the Court determines whether a particular case merits consideration, with due regard to the

proper functioning of the limited reviewing power to which this Court is confined, decisively restricted through the creation of the intermediate Courts of Appeals and more largely confined by the Judiciary Act of 1925. In illustrating the character of reasons which may be deemed 'special and important,' the Rule refers to cases

> 'Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.'

A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. (*Magnum Import Co.* v. *Coty*, 262 U. S. 159, 163; see also Address of Mr. Chief Justice Vinson, before the American Bar Association, Sept. 7, 1949, 69 Sup. Ct. v, vi; Address of Mr. Chief Justice Hughes, before the American Law Institute, May 10, 1934, XI Proc. Am. Law Inst. 313.) 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic. * * *

* * * *"

And further at 4197, 4198:

"* * * In the words of Mr. Chief Justice Taft, speaking for a unanimous Court:

> 'If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to

> dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.' *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U. S. 387, 393."

The question of whether the transportation in the case at bar was "performed directly by the State," so as to come within the reservation of the Additional Protocol and the United States reservation is easily disposed of. The original complaint alleged, and the answer admitted, that the airplane was "owned, operated and controlled" by defendant. The tickets, copies of which are attached to the affidavits on the motion, were issued by Pan American Airways. The affidavits submitted by petitioner herself consistently refer to the "Pan-American Airways' Yankee Clipper" and "a Pan-American Airways' clipper". The only suggestion of any connection of the United States with the transportation is the statement in Mr. Abraham's affidavit (Papers on Appeal, p. 43) that he had been notified " * * * that the War Department had made arrangements for the performers to leave New York on a Pan-American Airways' clipper". To say that an agency which arranges for a person's transportation and buys his ticket "performs the transportation" is to do violence to the English language. If there were any doubt, it would be laid to rest by the language of the Convention. Article 1 refers to transportation "performed by air-

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craft for hire," "performed by an air transportation enterprise," and "performed by several successive air carriers." Article 30 refers to "transportation to be performed by various successive carriers" and defines the liability of a carrier with respect to "* * * that part of the transportation which is performed under his supervision." The same Article restricts a passenger's right of action to "* * * the carrier who performed the transportation during which the accident or delay occurred, * * *." Article 34 provides that the Convention shall not apply "* * * to transportation performed in extraordinary circumstances outside the scope of an air carrier's business." Quite obviously, all of these provisions have reference to the carrier who has actual physical control over the operation of the flight, and not to a person or agency who may have "made the arrangements" for the transportation.

Petitioner's other contention is set forth at pages 6 and 7 of the petition, where she states that the first "Question Presented" is whether the provisions of the Convention are applicable to her, "who never contracted for such passage and to whom a ticket was never delivered; but who took passage after a ticket in her name was issued without her knowledge or consent." She states that the Court of Appeals "erroneously interpreted and applied Articles 1 and 3" of the Convention.

Actually, as an examination of the record will show, the question was and is much narrower than that, and the decision of the Court of Appeals hinged not upon any question of whether the Convention was applicable, nor upon any interpretation of the provisions of the Convention, but upon the facts appearing in

the affidavits and the application to those facts of the New York law of agency.

Petitioner did not attack the validity or constitutionality of the Convention below. Nor did she contend that the transportation was not "international" within the definition contained in Article 1.* She apparently does not seek to raise those questions now, despite the wording of her "Questions Presented". In any event, she is foreclosed from raising those questions for the first time on this petition, not having raised them below. *Whitney* v. *California,* 274 U. S. 357, 360; *White River Co.* v. *Arkansas,* 279 U. S. 692, 700.

Petitioner's principal argument in the New York Court of Appeals, as the nature of the questions certified to that court show (Petition, pp. 9, 10), was that Mr. Abraham, who concededly took delivery of her ticket, was not authorized by her to do so, so that no ticket was actually delivered to her as required by Article 3 of the Convention. Had the Court of Appeals accepted this argument, the defendant would have been deprived of the benefits of the limitation provisions of the Convention. The petitioner lost no rights because the Court of Appeals rejected her argument. Under the specific provisions of Article 3 all

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* As a matter of fact, in a prior action brought by the administrator of a passenger killed in the same accident, the Court of Appeals held that the flight was subject to the provisions of the Warsaw Convention, and that the Convention did not conflict with the Federal Constitution. This Court denied certiorari. *Garcia* v. *Pan American Airways, Inc.,* 295 N. Y. 852, cert. denied for want of final judgment, 329 U. S. 741, cert. denied 338 U. S. 824. Similarly, in *Lee* v. *Pan American Airways, Inc.,* 275 App. Div. 855, leave to appeal denied 300 N. Y. 761, the New York courts upheld the constitutionality of the Convention, and this Court denied certiorari, 339 U. S. 920.

of the Convention rules (except those limiting or excluding the carrier's liability), including the presumption of liability in petitioner's favor (Article 17), apply whether or not a ticket is delivered. And, of course, petitioner was still entitled to prove wilful misconduct and thus escape the limitation provisions. That issue was actually tried, and decided against her by the jury.

Petitioner's argument that Abraham was not authorized to accept delivery of her ticket was rejected by the Court of Appeals not on the basis of its interpretation of the word "delivery" as used in the Convention. That Court accepted without question petitioner's construction of the Convention as meaning that the ticket must be delivered to someone authorized by her to accept delivery. It rejected petitioner's argument because, as the opinion states (299 N. Y. at page 96):

> "* * * it can hardly be disputed that, when a ticket bearing appellant's name and all particulars as to the intended route as well as a reference to the Warsaw Convention limitation, was laid in front of appellant on the table in the airport, she, by thereafter boarding the plane as a traveler on that ticket, impliedly, if not expressly, ratified and adopted what had been done by the Army, and later by Abraham, in taking out that ticket in her name.
>
> Thus the special, and undisputed, facts in these affidavits make impossible, as matter of law, any finding other than that the ticket was 'delivered' * * *."

That clearly is not a holding dependent upon the construction of the Convention. It is an analysis of

the particular facts disclosed by the affidavits, and the application to those facts of the New York law of agency. It is significant that the dissenting opinion, upon which petitioner relies, makes no argument that the Convention was wrongly interpreted by the majority; it states only that there were issues of fact which the court should not have decided summarily. And on the crucial point of ratification, which was the crux of the majority opinion, the dissent cites no cases decided under the Convention, and no federal cases, but a single case decided by the New York courts, interpreting New York law, in 1877.

The decision of the Court of Appeals, therefore, is based primarily upon the facts presented on the motion, and upon the legal significance of those facts in New York law. It therefore presents no question which is a proper one for review by this Court. The point is very similar to that presented in the case of *General Pictures Corp.* v. *Western Electric Co.,* 304 U. S. 175. That was a suit to restrain patent infringements. The patents were of course granted by the United States, so that a federal right was directly involved. One of the questions presented in the brief supporting the petition for certiorari, but not in the petition itself, was "* * * whether, by acceptance and retention of royalties paid by the licensed manufacturer, respondents acquiesced in the infringement and are estopped from maintaining the suit." This Court declined to review that question because it was not properly presented in the petition, but it also stated, at page 178:

> "There is nothing in the lower courts' decision on either of the added questions to warrant review here: Whether respondents acquiesced in

the infringement and are estopped depends upon the facts. Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it. *Southern Power Co.* v. *N. C. Public Service Co.,* 263 U. S. 508. *United States* v. *Johnston,* 268 U. S. 220, 227 * * *."

Similarly, in *Southern Power Company* v. *North Carolina Public Service Company,* 263 U. S. 508, this Court had granted a writ of certiorari upon the petitioner's representation that the decree below would deprive it of property without due process. After argument, the Court dismissed the writ as improvidently granted, saying at page 509:

> "The argument developed that the controverted question was whether the evidence sufficed to establish actual dedication of petitioner's property to public use—primarily a question of fact. That is not the ground upon which we granted the petition and if sufficiently developed would not have moved us thereto."

The cases cited by petitioner are not to the contrary. In *Burthe* v. *Denis,* 133 U. S. 514, the state court had decreed that an award made under a treaty should be distributed among all the heirs and legatees of the original claimant, American as well as French, although the treaty expressly provided only for claims of French citizens. This Court took jurisdiction and reversed, on the ground that state laws of distribution must give way to the terms of the treaty. Obviously, the construction of the treaty and an apparent conflict with state law was directly involved.

In *Ancient Egyptian Arabic Order* v. *Michaux,* 279 U. S. 737, the petitioning corporation, organized

under an Act of Congress, was enjoined by the state court from certain practices which were found to constitute "fraudulent deception" injurious to the respondent. The state court based its decision in part upon a finding that the respondent was not guilty of laches. This Court held that that finding "* * * not only * * * is without fair support in the evidence, but that the evidence conclusively refutes it," so that the decree deprived the petitioner of a federal right on a non-federal ground of decision which was contrary to the evidence.

In *United States* v. *Pink*, 315 U. S. 203, this Court specifically held that it would not inquire into the propriety of the procedure of the New York court in grounding a motion for summary judgment upon the record in another case, since that "* * * is distinctly a question of state law, on which New York has the last word." The point involved in the *Pink* case, however, depended upon an interpretation of Russian law on which a claim of the United States was based; and as to that, this Court said, at page 218, "While deference will be given to the determination of the state court, its conclusion is not accepted as final."

In *Dyer* v. *Sims*, 341 U. S. 22, this Court expressly stated that the highest court of a state is "the ultimate tribunal in construing the meaning of her Constitution" in the ordinary sense. In that case, however, the question was whether a compact entered into with seven other states was in conflict with the Constitution of one, and, as this Court pointed out at page 28:

> "A State cannot be its own ultimate judge in a controversy with a sister State."

Here the question involved was simply one of the legal significance of undisputed facts under New York law. The holding of the New York court was certainly supported by the evidence. There was no question of the interpretation of the treaty or of any foreign law. The holding of the New York court was not in conflict with any obligation the state had undertaken nor was it in derogation of any federal right owing to the petitioner. Whatever "rights" she may have had under the Warsaw Convention were fully respected on the motion and the subsequent appeals, as well as on the trial and the final judgment. The decision of the New York Court of Appeals contains nothing which this Court should review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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